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FEDERAL ELECTION COMMISSION
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COMMISSION
2014 DEC 23 PM 12:07
OFFICE OF GENERAL
COUNSELJeff S. Jordan, Esq.
Office of General Counsel
Federal Election Commission
999 E Street, N.W.
Washington, DC 20463**Re: MUR 6902**
Senator Al Franken and Al Franken for Senate 2014

Dear Mr. Jordan:

We write as counsel to Senator Al Franken, Al Franken for Senate 2014 ("the Committee"), and Thomas Borman in his official capacity as Treasurer (collectively, "Respondents") in response to the complaint filed by Molly Cronin on November 4, 2014 ("the Complaint").

The Complaint alleges that a communication paid for by Independence USA PAC ("Independence USA") republished a Committee advertisement, resulting in a prohibited in-kind contribution to the Committee. The factual basis for the Complaint's allegations is the alleged similarity in theme between the two advertisements, and the fact that the Independence USA advertisement included video footage of Senator Franken that the Committee made publicly available online. The Commission has made clear on several occasions that these facts alone do not provide a basis to find that a communication has been "republished." Furthermore, even if Independence USA did "republish" a Committee advertisement -- which it did not -- Respondents do not have liability under the Federal Election Act of 1971, as amended ("the Act") unless coordination took place. Because the Complaint does not allege any facts showing that coordination took place, and because Respondents did not in fact coordinate with Independence USA, the Commission should dismiss the Complaint and close the file.

FACTUAL BACKGROUND

Senator Al Franken was re-elected for a second term in the U.S. Senate on November 4, 2014. Al Franken for Senate 2014 was his principal campaign committee. During the election cycle, the Committee published campaign advertisements on the Committee's YouTube channel¹ and made stock video footage ("B-roll") of Senator Franken publicly available on the Committee's website.² Among the advertisements available on the Committee's YouTube channel was an advertisement called "Gridlock,"³ which was published on September 24, 2014, and another

¹ See Al Franken for Senate 2014 YouTube channel, available at <https://www.youtube.com/user/FrankenForSenate>.

² See <http://www.alfranken.com/media/>.

³ See "Gridlock," (Sept. 24, 2014), available at <https://www.youtube.com/watch?v=CAk3W7VhU74>.

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advertisement called "Delivered" which was published on YouTube and began airing on television on October 30, 2014.⁴ The Committee also published footage of Senator Franken at the 2014 Minnesota State Fair on YouTube on September 22, 2014.⁵

The Complaint alleges that Independence USA ran an advertisement ("the Independence USA advertisement") supporting Senator Franken on October 30, 2014,⁶ that republished Committee campaign materials, specifically video footage from "Delivered." However, publicly available news reports⁷ acknowledge that in making the advertisement, Independence USA appears to have used footage from videos found on the Committee's publicly available YouTube channel. Additionally, the Complaint itself acknowledges that much of the footage in the Independence USA advertisement appears to have come from the B-roll the Committee made available on its website.⁸

LEGAL ANALYSIS

A. The Independence USA Advertisement did not "republish" the Committee's campaign materials.

The Complaint alleges that Independence USA republished "Delivered," a Committee advertisement, in violation of 11 C.F.R. § 109.23. The Complaint points to similarities in video footage between "Delivered" and the Independence USA advertisement. However, according to news reports and the Complaint itself, Independence USA appears to have gotten much of the video footage that the Complaint alleges was "republished" from videos available on the Committee's YouTube channel and the Committee's website. As the Commission's regulations and precedents demonstrate, the incidental use of publicly available video excerpts do not constitute "republishing," particularly where, as here, the excerpts do not contain any discernible message of their own, and are used solely to provide background imagery.

The purpose of the republication rule is to "distinguish[] between independent expressions of an individual's views and the use of an individual's resources to aid a candidate in a manner indistinguishable in substance from the direct payment of cash to a candidate."⁹ As the

⁴ See "Delivered," (Oct. 30, 2014), available at https://www.youtube.com/watch?v=oSyzwg_v7u4.

⁵ See "Sen. Al Franken at the 2014 Minnesota State Fair," (Sept. 22, 2014), available at <https://www.youtube.com/watch?v=QH79eH3bqbM>.

⁶ See Complaint, *passim*.

⁷ Catharine Richert, *Senate Race Gets \$500K from Former NYC Mayor Bloomberg*, MPR News (Nov. 1, 2014), available at <http://blogs.mprnews.org/capitol-view/2014/11/senate-race-gets-500k-from-former-nyc-mayor-bloomberg/> ("[S]ome of the video footage in the Independence USA PAC ad can found in videos on Franken's YouTube website, as well as another ad Franken's campaign recently aired. There's also B-roll footage of Franken interacting with supporters on his website.").

⁸ Complaint at 3.

⁹ H.R. Conf. Rep. 94-1057, 59, 1976 U.S.C.A.N. 946, 974 (1976).

Commission has held on many occasions since the Act's inception, not every third party use of candidate campaign materials is "republishing" under the Act. While the "wholesale copying of candidate materials constitutes republication," the "partial use of such materials in connection with one's own protected speech is not legally problematic."¹⁰

Here, the Complaint acknowledges that "the majority of the overlapping content in [the Independence USA advertisement] comes from Respondent Campaign's video footage, which has been made available for download at [the Committee's website address]."¹¹ Thus, according to the Complaint, the footage that the Complaint alleges Independence USA "republished" from "Delivered" actually came from a publicly available source -- the Committee's website. And although the Complaint fails to acknowledge this fact, the video footage in the Independence USA advertisement also appears to have come from videos published on the Committee's YouTube channel, including video footage of Senator Franken at the Minnesota State Fair that the Committee published on September 22, 2014.¹² Indeed, the "Farmer and Field" scene that the Complaint points out as a "similarity"¹³ between the Committee advertisement and the Independence USA advertisement appears to have been pulled from footage available in a Committee advertisement called "Gridlock." "Gridlock" was published on the Committee's YouTube channel on September 24, 2014,¹⁴ well before Independence USA published the advertisement at issue in the Complaint. Moreover, the Independence USA advertisement does not amount to "wholesale copying" of the Minnesota State Fair footage, "Gridlock" or any other Committee campaign materials. Instead, the Independence USA advertisement uses Committee materials as background images that are incorporated into "a communication in which Independence USA adds its own text, graphics, audio, and narration to create its own message."¹⁵

The Complaint also points to thematic similarities between "Delivered" and the Independence USA advertisement as evidence of republication under the Act.¹⁶ But the Commission has roundly rejected this approach, explaining that "[t]he regulations do not convert independent expenditures for [certain] communications into contributions based upon a similarity or even identity of themes with the campaign effort. Ideas and information can come from many sources, and their commonality is of itself insufficient to demonstrate either coordination or

¹⁰ Statement of Reasons of Chair Caroline Hunter and Commissioners Donald McGahn and Matthew Petersen, MUR 5879 (DCCC), at 5.

¹¹ Complaint at 3.

¹² See "Sen. Al Franken at the 2014 Minnesota State Fair," *supra* note 5.

¹³ See Complaint at 2.

¹⁴ See "Gridlock," *supra* note 3.

¹⁵ See Chair Caroline Hunter and Commissioners Donald McGahn and Matthew Petersen, MUR 6357 (American Crossroads).

¹⁶ See Complaint at 1 (alleging that the two advertisements contained the same messaging).

'copying.'"¹⁷ Likewise, the Commission has taken the position that similarities between a third party advertisement and a campaign communication are not evidence that there was coordination or republication because "[t]he practical reality is that an intelligently planned independent expenditure effort will always employ similar themes."¹⁸

B. The Complaint does not allege facts establishing that the Independence USA advertisement was a coordinated communication.

The Commission may find "reason to believe" only if a complaint sets forth specific un rebutted facts which, if proven true, would constitute a violation of the Act.¹⁹ Unwarranted legal conclusions from asserted facts or mere speculation will not be accepted as true, and provide no independent basis for investigation.²⁰ The Complaint fails to meet this standard.

The Complaint argues that Independence USA violated the Act by "republishing" footage from a Committee advertisement. However, Commission rules provide that, even if Independence USA had republished a Committee advertisement -- which it did not -- the Committee would not be liable under the Act for receiving a prohibited contribution unless the communication was otherwise coordinated: "The candidate who prepared the campaign material does not receive or accept an in-kind contribution, and is not required to report an expenditure, unless the dissemination, distribution, or republication of campaign materials is a coordinated communication under 11 C.F.R. 109.21 or a party coordinated communication under 11 C.F.R. 109.37."²¹ The Complaint does not allege a single fact to support the allegation that there was any actual coordination between the Committee and Independence USA. This is because, in fact, the Committee did not coordinate any of its activities with Independence USA. Accordingly, the Committee did not violate the Act or Commission regulations by receiving a prohibited in-kind contribution from Independence USA.

The facts that the Complaint does allege -- that Independence USA used footage that is publicly available on the Committee's website; that the Independence USA advertisement and the Committee advertisement contained similar themes; and that the two advertisements were disseminated on the same day -- are not sufficient to establish that either was a coordinated communication and do not constitute a violation of the Act by Respondents.

¹⁷ Commissioner Thomas Josefiak, Statement of Reasons, MUR 2272 (American Medical Association).

¹⁸ Commissioner Josefiak Statement of Reasons, MUR 2766 (Auto Dealers and Drivers for Free Trade Political Committee, *et al.*).

¹⁹ See 11 C.F.R. § 111.4(d); Commissioners David Mason, Karl Sandstrom, Bradley Smith and Scott Thomas, Statement of Reasons, MUR 4960 (Hillary Clinton for Senate).

²⁰ *Id.*

²¹ 11 C.F.R. § 109.23(a); *see also* MUR 6667 (Friends of Cherie Bustos); MUR 6617 (Vilsack for Iowa).

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CONCLUSION

Because the Complaint has not alleged facts that provide a sufficient basis for the Commission to find "reason to believe" that the Act or Commission regulations have been violated, the Commission should dismiss the Complaint and immediately close the file.

Very truly yours,

Marc E. Elias
/s/

Marc E. Elias
Counsel to Respondents